UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	03-30930 (LMW)
SIRAJ SHIVANI and SHAMIRA S. SHIVANI,	CHAPTER	7
DEBTORS.	DOC. I.D. NOS.	26, 35
MONTANO CIGARETTE, CANDY & TOBACCO, INC.,		
MOVANT		
vs.		
SIRAJ SHIVANI, SHAMIRA S. SHIVANI and MICHAEL J. DALY, TRUSTEE,		
RESPONDENTS.		

APPEARANCES

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MEMORANDUM OF DECISION RE:
AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY

Lorraine Murphy Weil, United States Bankruptcy Judge

Before the court is the above-captioned movant's ("Montano") amended motion for relief from stay (Doc. I.D. No. 35, the "Amended Motion"). This matter is a "core proceeding[]" within the purview of 28 U.S.C. § 157(b). This memorandum constitutes the findings of fact and conclusions of law mandated by Rule 7052 of the Federal Rules of Bankruptcy Procedure (made applicable to this contested matter by Rule 9014 of the Federal Rules of Bankruptcy Procedure).

I. FACTS AND PROCEDURAL BACKGROUND

The following facts appear of record as indicated, or are uncontested. This case was commenced by the above-captioned debtors (the "Joint Debtors") by the filing of a joint petition under chapter 7 of the United States Bankruptcy Code on February 25, 2003. (*See* Doc. I.D. No. 1.) At the same time, the Joint Debtors filed their schedules and statement of financial affairs. (*See* Doc. I.D. No. 1, collectively, the "Schedules.") On the Joint Debtors' Schedule A (Real Property), the Joint Debtors listed the family home located at 23 Laura Circle, East Haven, CT 06512 (the "Property") with a stated value of $150,000.00. (*See* Doc. I.D. No. 1 (Schedule A).) The Schedules state that the Property is the sole property of the husband debtor (the "Debtor"). (*See id.*) The Joint Debtors' Schedule D (Creditors Holding Secured Claims) shows only one secured claim in respect of the Property: a "[f]irst [m]ortgage" (the "Mortgage") in favor of "Household" in the amount of $153,890.24. (*See* Doc. I.D. No. 1 (Schedule D).) The Joint Debtors' Schedule C (Property Claimed as Exempt) claims a "homestead exemption" (the "Homestead Exemption") in respect of the Property under Connecticut law in the amount of $75,000.00 (presumably in favor of the Debtor). (*See* Doc. I.D. No. 1 (Schedule C).) The Joint Debtors' Schedule F (Creditors Holding Unsecured Nonpriority Claims) lists a noncontingent, liquidated and undisputed "unsecured claim" against the Debtor in favor of Montano in the amount of $28,000.00 with the following explanation:

"[p]ersonal guarantee on wholesale cigarette sales made to . . . [the Debtor's former] employer, East Haven Amoco, Inc. ["East Haven Amoco"]." (*See* Doc. I.D. No. 1 (Schedule F).)[1] In the Joint Debtors' Statement of Financial Affairs, they list the following lawsuit (the "Civil Action") pending in Connecticut Superior Court for the Judicial District of New Haven at New Haven: "*Montano Cigarette, Candy & Tobacco, Inc. v. East Haven Amoco, Inc., Et Al.*; Case Number CV-02-0467755-S. (*See* Doc. I.D. No. 1 (Statement of Financial Affairs, item 4).) The listed "[n]ature [o]f [that] [p]roceeding" is "[c]ollection suit against guarantor of debt." (*See id.*) The Statement of Financial Affairs indicates that no attachment had issued in the Civil Action. *(See id.)*

The Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (Doc. I.D. No. 2) for this case was served upon creditors on March 1, 2003. (*See* Doc. I.D. No. 3.) Among other things, that notice advised creditors: "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So." (Doc. I.D. No. 2.) On May 27, 2003, the Joint Debtors received their chapter 7 discharge. (*See* Doc. I.D. No. 8 (the "Discharge").) On July 2, 2003, the chapter 7 trustee (the "Trustee") filed a notice of recovery of assets. (*See* Doc. I.D. No. 10.)[2] On July 3, 2003, the Clerk's Office served upon creditors a "Notice of Need To File Proof of Claim Due To Recovery of Assets," setting October 1, 2003 as the

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[1] The Joint Debtors' Schedule B (Personal Property) states: "Debtor husband owns 30% of shares of East Haven Amoco, Inc., Route 80, East Haven, CT." (Doc. I.D. No. 1 (Schedule B).) Schedule B lists the value of that interest as "0.00." (*See id.*) The Debtor lists his current employer as "Monroe Food Mart" for whom he had worked as a "[c]lerk/[c]ashier" "since February 1, 2003." (*See* Doc. I.D. No. 1 (Schedule I (Current Income of Individual Debtors).) The Joint Debtors list East Haven Amoco as a "codebtor" in respect of the debt to Montano. (*See* Doc. I.D. No. 1 (Schedule H (Codebtors).)

[2] It has been suggested that the recovery of assets emanates from the allegedly unperfected status of the Mortgage. The record of this case subsequent to these proceedings supports that suggestion to some extent.

last date for filing proofs of claim in this case. (*See* Doc. I.D. No. 11.) On September 26, 2003, Montano filed a proof of claim in this case. (*See* Proof of Claim No. 23, the "POC.") The POC asserts a total claim in the amount of $28,951.79 as follows: secured claim in the amount of $28,000.00; and unsecured claim in the amount of $951.79. (*See id.*) Annexed to the POC (and serving as foundation for its assertion of a secured claim) is a copy of a writ of attachment recorded on the East Haven land records on August 5, 2002 with respect to an attachment (the "Attachment") issued in the Civil Action against the Debtor's interest in the Property in the amount of $28,000.00. (*See* Proof of Claim 23.) No party in interest has objected to the POC.[3]

On August 15, 2003, the Trustee filed a notice of proposed sale (the "Proposed Sale") in respect of the Property. (*See* Doc. I.D. No. 17.) The Proposed Sale is a sale to the Debtor of "all such right, title, and interest the Estate has in and to the . . . [Property]" for $60,000.00 (plus "all costs of recording and conveyance taxes, if any"). (*Id.*) The Proposed Sale subsequently was approved with the stipulation that mortgage and lien priorities were unaffected by such sale.

On September 8, 2003, Montano filed a Motion for Relief from Stay in respect of the Property. (*See* Doc. I.D. No. 22, the "Original Motion.") Montano sought a grant of the Original Motion pursuant to this court's "Short Calendar Procedure." (*See* Doc. I.D. Nos. 23, 24, 27, 28.) However, the Debtor filed a timely objection (Doc. I.D. No. 26, the "Objection") to the Original Motion, and the Original Motion was scheduled for a hearing (the "Hearing") on October 29, 2003. (*See* Doc. I.D. Nos. 31, 33.) At the Hearing, the court declined to proceed until the Original Motion had been amended to include the Trustee

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[3] The validity and perfection of the Attachment has not been challenged by the Debtor or the Trustee. Because the date of recordation is more than ninety days prior to the petition date, the Attachment is not avoidable as a preference. *See* 11 U.S.C. § 547.

in the caption in accordance with D. Conn. LBR 9013-1. Accordingly, the Hearing was continued to November 12, 2003 (the "Continued Hearing").[4] Montano filed the Amended Motion to conform to the court's direction (*see* Doc. I.D. No. 35),[5] and due notice of the Continued Hearing was given to the Trustee (*see* Doc. I.D. No. 36).

The Continued Hearing was convened as scheduled. The Trustee did not appear nor did he file an objection to the Amended Motion. No evidence was offered at the Continued Hearing but oral argument was presented by counsel for Montano and the Debtor. The parties agreed that there were no contested issues of fact. At the conclusion of the Continued Hearing, the court directed the parties to file "mandatory" simultaneous initial briefs on or before December 1, 2003, and "optional" simultaneous answer briefs on or before December 8, 2003. The Debtor has filed no briefs at all. Montano has filed the "mandatory brief."[6]

II. THE AMENDED MOTION AND THE OBJECTION

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[4] Reference herein to the audio record of the Continued Hearing appears herein in the following form: "Record at ____:____:____."

[5] The court will deem the Objection to be directed to the Amended Motion.

[6] The consequence stated by the court for failure to file a "mandatory" brief was "waive[r]." (*See* Record at 3:27:02 — 3:27:26.) A document which purported to be the Debtor's "mandatory" brief was submitted to chambers but was neither filed in the Clerk's Office nor served upon the Movant (even after that omission was brought to Debtor's counsel's attention by chambers). Consequently, the court has neither considered nor read the unfiled and unserved document. However, because Montano must make a *prima facie* showing of its entitlement to the relief sought and because the issues are apparent on the face of the pleadings and were argued at the Continued Hearing, the court has proceeded to the merits below in order to make its determination.

The Amended Motion seeks relief from stay "for cause" to prosecute the Civil Action to judgment solely for the purpose of recording that judgment as a lien in respect of the Property.[7] At the Continued Hearing, counsel for Montano clarified that Montano would not attempt to foreclose any judgment lien so obtained without obtaining a further order of this court (if this case were still pending).[8]

The Objection admits the existence of the recorded Attachment. (*See* Objection ¶ 1.) However, the Objection asserts that the Amended Motion should be denied because:

> [t]he [Original Motion] . . . was not filed until about September 5, 2003, more than 3 ½ months after the issuance of the . . . [D]ischarge [and because] continuation of the . . . [Civil Action] . . . is barred by 11 U.S.C. § 524 as [the Original Motion] . . . was not filed prior to the issuance of the [D]ischarge.

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[7] Upon due and timely recordation of a proper judgment lien certificate, under Connecticut law the judgment lien and the Attachment would merge and lien priority would date from the date of recordation of the Attachment. *See* Conn. Gen. Stat. § 52-380a. The Amended Motion alleges that the Debtor has been defaulted in the Civil Action for failure to disclose a defense. (*See* Amended Motion ¶ 11.)

[8] The automatic stay of acts against the Debtor and his property terminated when the Discharge was entered. *See* 11 U.S.C. § 362(c)(2)(C). However, the Property remained property of the estate and the automatic stay continued with respect to it as of the time of the Continued Hearing. *See* 11 U.S.C. §§ 362(a), 362(c)(1). The Proposed Sale may have closed and the Property now may no longer constitute property of the estate. However, if the court declares the Amended Motion to be moot, the issue will be presented again purely as a question of the effect of the Discharge. Accordingly, in the interests of judicial economy, the court will decide the Discharge issue in the context of the Amended Motion. The court expresses no opinion as to whether Montano would be able to foreclose any judgment lien it obtains given the existence of the Homestead Exemption.

(Objection ¶¶ 6, 7.)[9] The Objection does not allege that the Debtor has suffered any particular prejudice as a result of the referenced 3 ½ month delay, nor was any such prejudice suggested at the Continued Hearing.

[9] Because the parties treat the legal issues discussed below as completely dispositive of Montano's entitlement to the relief it seeks (*i.e.*, that Montano has established "cause" under Section 362(d)(1)), the court will do likewise.

III. ANALYSIS

It has long been the law that a Connecticut attachment that was duly recorded prepetition and was not avoided in the debtor's bankruptcy survives the debtor's bankruptcy discharge. *See Wakeman v. Throckmorton*, 74 Conn. 616, 51 A. 554 (1902) (decided under prior Bankruptcy Act). The court in *Wakeman* reasoned as follows:

> The lien of the plaintiff's attachment . . . could only be made available in case of a subsequent judgment in his favor; but it existed from the date of the service of the mesne process: and the rights of the parties by the laws of Connecticut would be determined as of that time under a levy of execution. . . . [T]he rendition of a judgment in . . . favor [of the plaintiff] in the court of common pleas would seem to be a proper and material stage in the procedure. Such a judgment, after the defendant's discharge in bankruptcy, could only be a limited one, to be satisfied out of the property attached. . . .

Wakeman v. Throckmorton, 51 A. at 555-56. As discussed below, a careful reading of the current Bankruptcy Code produces the same result.

Initially, property interests are defined by state law. *Canney v. Merchants Bank* (*In re Canney*), 284 F.3d 362, 370 (2d Cir. 2002). Under Connecticut law, prior to entry of judgment a duly-recorded attachment is an "inchoate" lien upon the subject property. *State v. Bucchieri*, 176 Conn. 339, 348 (1978); *Shawmut Bank v. Brooks Development Corp.*, 46 Conn. App. 399, 410 (1997). What constitutes a "lien" for bankruptcy purposes is defined by Bankruptcy Code § 101(37). *See* 11 U.S.C. § 101(37) (definition of lien). However, even an "inchoate" prepetition lien is a "lien" within the purview of Bankruptcy Code § 101(37). *Vienna Park Properties v. United Postal Savings Ass'n (In re Vienna Park Properties)*, 976 F.2d 106, 113 (2d Cir. 1992). In a chapter 7 case, unless a "lien" has been avoided by the chapter 7 trustee pursuant to chapter 5 of the Bankruptcy Code (or by the debtor pursuant

to Bankruptcy Code § 522), or is "void" under Bankruptcy Code § 506(d),[10] a Section 101(37) "lien" remains valid.[11]

As noted above, Montano filed the POC and no party in interest has objected to it. Thus, the POC represents a "deemed" allowed secured claim. *See* 11 U.S.C.A. § 502(a) (West 2004) ("A claim . . . , proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."). Moreover, Montano was not required to file the POC in order to avoid having its lien declared "void" under Section 506(d). *See* 11 U.S.C. § 506(d)(2) (lien not "void" just because proof of claim not filed).[12] In sum, Montano's lien has not been avoided by the Trustee or by the Debtors, and is not "void" pursuant to Section 506(d). Thus, Montano's state law "inchoate lien" remains valid. Section 524(a) does not change that result.

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[10] Section 506(d) provides in relevant part that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . ." 11 U.S.C.A § 506(d) (West 2004).

[11] Connecticut courts refer to the subsequent obtaining of judgment and timely filing of a judgment lien as "perfect[ing]" the attachment. *See, e.g., Mac's Car City v. DiLoreto*, 39 Conn. App. 518, 521(1995), *aff'd*, 238 Conn. 172 (1996). However, those courts do not refer to "perfection" in the bankruptcy sense (*i.e.*, the obtaining of priority over subsequent lien creditors). Rather, the Connecticut courts refer to "perfect[ion]" only in the sense of making the lien "available" to the attachment creditor (*i.e.*, putting the attachment creditor in the position to realize upon, or enforce, its lien). *See Wakeman v. Throckmorton, supra*. *See also In re Vienna Park Properties*, 976 F.2d at 112 ("[T]he enforceability of . . . [a lien] is an issue distinct from the issue [of] whether a . . . [lien] exists . . . . The failure of a secured party to perform enforcement procedures prior to bankruptcy merely renders . . . [a lien] inchoate, not nullified."(applying Virginia law)).

[12] Moreover, a chapter 7 debtor cannot use Section 506(d) to render a lien void on the grounds that there is insufficient collateral value to cover the lien (even if that were the case here). *See Dewsnup v. Timm*, 502 U.S. 410 (1992).

Section 524(a) provides in relevant part:

> (a) A discharge in a case under this title –
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability* of the debtor with respect to any debt discharged under . . . [title 11] . . . ;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a *personal liability* of the debtor . . . .

11 U.S.C.A. § 524(a) (West 2004) (emphasis added). On its face, Section 524(a)(1) voids a judgment only to the extent that the judgment determines a *personal liability* of the debtor. Thus, Section 524(a)(1) does not preclude postpetition entry of a judgment which serves only as a precondition to the plaintiff's realizing on a valid prepetition lien. *See* 4 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* ¶ 524.02[1], at 524-14 (15th ed. rev. 2003) ("[A] creditor [may not] proceed *in rem* against a property interest of the debtor *if the creditor has no lien before the bankruptcy case* and the debtor's personal liability has been discharged.") (emphasis added). *Cf. Green v. Welsh*, 956 F.2d 30, 35 (2d Cir. 1992) ("[Section] 524 permits a plaintiff to proceed against a discharged debtor solely to recover from the debtor's insurer. Applied here, this principle permits Green to continue her suit against the Welshes to establish liability as a precondition to recovery from the Welshes liability insurer."). Section 524(a)(2) similarly is limited to the "collect[ion], recover[y] or offset" of a discharged debt as a "personal liability" of the debtor and, accordingly, does not bar postpetition actions to enforce prepetition liens. Moreover, permitting the prepetition attachment creditor to obtain postpetition a judgment for the limited purpose asserted here does not "promote" the underlying claim to secured status at the expense of unsecured creditors. Rather, such relief merely preserves the state-law priority over unsecured creditors already

achieved by the attachment creditor prepetition. Therefore, the Discharge presents no bar to Montano's prosecuting the Civil Action to judgment for the sole purpose of enforcing the Attachment. *Accord Federal Deposit Ins. Corp. v. Debtor & Trustee (In re Moscoso Villaronga)*, 111 B.R. 13 (Bankr. D. P.R. 1989); *Shawmut Bank v. Brooks Development Corp.*, 46 Conn. App. at 410-11 (*citing, inter alia, Moscoso*).[13] *See also Transamerica Ins. Co. v. Trout*, 701 P.2d 851 (Ariz. Ct. App. 1985).

At oral argument, the Debtors relied upon *Sciarrino v. Mendoza*, 201 B.R. 541 (E.D. Cal. 1996), which holds that Section 524 prevents a prepetition attachment creditor from reducing its claim to judgment for the sole purpose of enforcing its attachment unless the creditor obtains pre-discharge relief from stay to do so, obtains a determination of nondischargeability or successfully objects to entry of the discharge. This court finds *Sciarrino* unpersuasive. First, *Sciarrino* relied upon *In re Paeplow*, 972 F.2d 730 (7th Cir. 1992), in which the potential postpetition judgment lien creditor had not obtained a prepetition attachment. Second, even if this court accepts a laches or waiver type analysis similar to that set forth in *Sciarrino* with respect to a delay between discharge and the relevant creditor's motion (and the court

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[13] The *Moscoso Villaronga* court explained:

> " . . . Section 524 does not bar the creditor from enforcing a valid, prebankruptcy lien . . . against property that has been retained by the debtor or the estate after discharge. . . . Actions to collect against the debtor personally are enjoined. The creditor's action in enforcing a lien is against the property *in rem* and with no recourse against the debtor."

Moscoso Villaronga 111 B.R. at 18 (last alteration in original) (quoting 1 *Norton Bankruptcy Law and Practice*, sections 27.02 and 27.04).

expresses no opinion on the merits of such analysis), a delay in seeking relief from stay longer than the delay here was rejected by the Second Circuit in *Welsh v. Green* absent proof of prejudice to the debtor.[14]

IV. CONCLUSION

For the reasons discussed above, an order will enter modifying the automatic stay in respect of the Property (to the extent, if any, that such stay remains in effect with respect thereto) to permit Montano to prosecute the Civil Action to judgment for the sole purpose of recording a judgment lien certificate against the Property with respect to such judgment (subject to the conditions that, (1) said judgment lien certificate shall comply in form and substance and recordation date with Conn. Gen. Stat. § 52-380a (including subsection (b) thereof), (2) if the Property now is property of the bankruptcy estate, for as long as the Property remains property of the bankruptcy estate Montano shall not seek to foreclose any judgment lien

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[14] The *Welsh* court stated:

> Green did miss several opportunities to obtain the relief she ultimately sought. . . . Prior to discharge, Green could have sought to continue her suit by moving for relief from the automatic stay. Following discharge, Green could have appealed the discharge order . . . . But we do not believe the delay of approximately eight months between the time the bankruptcy court issued the discharge order and her motion at issue here should forever bar her from continuing her suit, because this delay has resulted in no prejudice to the insurer or the debtor. *See In re Walker*, 927 F.2d 1138, 1143 (10th Cir. 1991) (plaintiff may sue debtor solely to establish liability despite one-year delay in seeking relief from discharge injunction where, *inter alia*, debtor was not prejudiced by the delay); *see also In re Mann*, 58 B.R. at 955) (bankruptcy court permitted plaintiff to proceed against debtor to recover from debtor's insurer even though plaintiff moved for such relief ten months after debtor was granted a discharge). . . .

Welsh v. Green, 956 F.2d at 35. Because the *Welsh* court found a *Sciarrino*-type analysis inapplicable on the facts, it was unnecessary for the Second Circuit to consider the propriety of that analysis as a matter of law.

so obtained without a further order of this court and (3) in no event shall such judgment constitute an *in personam* liability of the Debtor).[15]

BY THE COURT

DATED: March 11, 2004

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Lorraine Murphy Weil
United States Bankruptcy Judge

[15] Should Montano lose the priority of the Attachment by failing to comply with Section 52-380a, any judgment lien obtained by it with respect to the Property would be void pursuant to Bankruptcy Code § 524(a). *See In re Paeplow*, *supra*. *Cf*. *Mac's Car City v*. *DiLoreto*, 238 Conn. at 179 ("Upon expiration of the [statutory] . . . four month period without a proper filing [of a judgment lien certificate], . . . the prejudgment attachment is extinguished.").